Supreme Court, U.S.
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No. 85-1158

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LARRY CRAWFORD, *Et Alia*,

Petitioners,

v.

UNITED STEELWORKERS, AFL-CIO, *Et Alia*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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January 9, 1986

QUESTION PRESENTED

1. Whether the decision of the majority of the Supreme Court of Virginia, reversing the award by the trial court against the Respondents of actual damages in the amount of $1,000 each and punitive damages in the amount of $10,000 each to the nine Petitioners for use of insulting words, improperly interpreted this Court's intent in its decision in *Austin v. Old Dominion Branch No. 496, National Association of Letter Carriers*, 418 U.S. 264, 94 S. Ct. 2770, 41 L.Ed.2d 745 (1974).

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No. 85-____

IN THE

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OCTOBER TERM, 1985

LARRY CRAWFORD, *Et Alia*,

Petitioners,

v.

UNITED STEELWORKERS, AFL-CIO, *Et Alia*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Larry Crawford, Thomas E. Dudley, Charles E. Eaves, G.W. Keffer, Michael D. Kellison, Raleigh Newby, James E. Noonkester, Richard Lee Spicer, and Lewis H. Vaughn, Petitioners, pray that a Writ of Certiorari issue to review the decision of the Supreme Court of Virginia filed October 15, 1985, in this proceeding.

OPINION BELOW

The opinion of the Supreme Court of Virginia appears in Appendix A hereto.

JURISDICTION

The Order and Decision of the Supreme Court of Virginia reversing the trial court's decision in this case was

filed on October 11, 1985. This Petition For A Writ Of Certiorari is filed within ninety days of that date. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1257(3).

STATUTORY PROVISION INVOLVED

This case involves § 8.01-45 of the Code of Virginia (1950), as amended:

> All words shall be actionable which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace.

STATEMENT OF THE CASE

The Petitioners instituted an action in the Circuit Court of Giles County, Virginia, on June 25, 1978, for damages resulting from the Respondents' use of insulting language, for damages for emotional distress, and for damages for Respondents' assaults on the Petitioners. On July 25, 1978, Respondents filed a demurrer which was denied on September 6, 1978. Subsequently, on June 8, 1979, Petitioners filed an Amended Bill of Complaint.

A three-day trial took place from May 26-28, 1981, at which time all issues were tried and all evidence was taken, except that further testimony was presented with respect to Defendant Kermit Stevers. A final order, pursuant to a letter of opinion of the court below, was entered on February 25, 1982. The court awarded damages to each of the Petitioners in the amount of $11,000 against certain Respondents, jointly and severally, for the use of certain insulting language. The trial court failed to

award damages for some of the words alleged, for the emotional distress suffered by the Petitioners, and for the assaults on the Petitioners. Respondents herein timely filed a Notice of Appeal from the judgment entered on February 25, 1982, and the Supplemental Order dated October 12, 1982. That appeal was decided by the Supreme Court of Virginia on October 11, 1985, at which time the trial court was reversed in a 4-3 decision. Petitioners herein also timely filed a Notice of Appeal from the judgment entered by the trial court, and that appeal was also decided by the Supreme Court of Virginia on October 11, 1985.

STATEMENT OF FACT

On August 26, 1977, Local 14948 of the United Steelworkers, AFL-CIO, (hereinafter the "Local") voted to engage in a strike at Virginia Lime Company (hereinafter "Virginia Lime") in Giles County, Virginia. As a result of several incidents at the site of the picket line at Virginia Lime, Judge Powell of the Circuit Court of Giles County issued an injunction on September 3, 1977, restricting activities of those on the picket line set up by the Local. (Plaintiffs' Exhibit 12). Subsequently, on more than one occasion, members of the Local were found in contempt of court for actions occurring on the picket line both toward the Company and toward, in some cases, individuals who are Petitioners herein. (Plaintiffs' Exhibit 13). Some of these actions involved those who are Respondents herein and whose acts against the Petitioners are set forth in the allegations of the Motion for Judgment in this case. During the course of the aforesaid strike, the Respondents engaged in many acts of outrageous conduct and threats of physical and emotional

abuse towards the Petitioners in this case.

Daily, the Petitioners were subjected to name-calling and the use of the most vile, insulting and outrageous language, including the words "son-of-a-bitch," "bastard," "nigger" (with respect to the two black Petitioners), "cocksucker," "motherfucker," and derivatives of these words. (TR 19, 20, 31, 41, 69, 70, 71, 72, 73, 74, 85, 86, 87, 88, 91, 107, 108, 109, 110, 123, 162, 163, 164, 184, 186, 187, 196, 197, 198).

The Respondents participated in the strike at Virginia Lime from its inception until its end in March 1979. Respondent United Steelworkers, AFL-CIO, also admitted that it authorized the strike at Virginia Lime and continued to so authorize it and support it after August 26, 1977. (Paragraph 6 of Answer to Amended Bill of Complaint).

REASONS FOR GRANTING THE WRIT

The Supreme Court Of Virginia Has Misinterpreted And Failed To Apply Properly The Decision Of This Court In *Austin v. Old Dominion Branch No. 496, National Association of Letter Carriers*, With Respect To § 8.01-45 Of The Code Of Virginia (1950), As Amended.

The majority of the Supreme Court of Virginia, in its decision in this case, interpreted that the decisions of this Court in *Austin v. Old Dominion Branch No. 496, National Association of Letter Carriers*, 418 U.S. 264, 94 S. Ct. 2770, 41 L.Ed.2d 745 (1974), and in *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 86 S. Ct. 657, 15 L.Ed.2d 582 (1966), as preventing the recovery of

damages for the use of outrageous, vile and insulting words in the context of a labor dispute.

As pointed out by the minority opinion below, the standard to observe in this case is words which by their usual construction and common acceptation are construed as insults and tend toward violence and breach of the peace. Section 8.01-45 of the Code of Virginia (1950), as amended. The intent of the statute is to prevent violence and threats of violence, and to prevent the use of language that is insulting and abusive to the citizens of the State of Virginia, language which is designed to incite violence and breach of the peace, and language which, when used, would inflict emotional distress upon the person toward whom the language is directed. In referring to the language used here, the minority opinion stated:

> The language used by the defendants is intolerable by any civilized standard. Taxes, military service, and conformity to the law may be a high price to pay for life in an orderly society, but the compensating benefits of peace and public order are thought by most citizens to be worth the price. Internal peace and public order, indeed, are the principal benefits the State has to offer us in exchange for its numerous constraints on our freedom to do and say precisely what we want.
>
> The words spoken by the defendants were like physical blows. They were, in themselves, foul-mouthed violence tantamount to an assault. No free man or woman should be expected to endure them without redress. Language of this kind, even in a relatively permissive age, may be expected to incite prompt retaliation. Such words are true "fighting

> words" because of their propensity to provoke an immediate breach of the peace, which is no trivial matter in light of the tendency of many of our citizens to keep and bear arms.

Appendix (App.) A, p. 28a.

Furthermore, § 40.1-53 of the Code of Virginia (1950), as amended, makes unlawful the use of insulting or threatening language for the purpose of inducing or attempting to induce the person toward whom the language is directed to quit his employment or refrain from seeking employment. The language used by the Respondents in this case certainly falls within that category. On a daily basis for over seventeen months, Petitioners were bombarded with insulting, abusive, and threatening language as they went in and out of work.

In interpreting what types of language would be actionable in the context of a labor dispute, this Court, in *Linn*, *supra*, expressly held that an action in state court for common law libel and slander is not preempted by federal law:

> . . . We conclude that where either party to a labor dispute circulates false and defamatory statements during a union organizing campaign, the court does have jurisdiction to apply state remedies if the complainant pleads and proves that the statements were made with malice and injured him.

383 U.S. at 55, 86 S. Ct. at 659, 15 L.Ed.2d at 586.

This Court went on to say that it did not interpret the National Labor Relations Act[1] as "giving either party

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[1] 29 U.S.C. § 151, *et seq.*

license to injure the other intentionally by circulating defamatory or insulting material known to be false." 383 U.S. at 61, 86 S. Ct. at 662, 15 L.Ed.2d at 589.

Finally, this Court commented on the constitutional protection of defamatory language in the context of a labor dispute:

> . . . But it must be emphasized that malicious libel enjoys no constitutional protection in any context. After all, the labor movement has grown up and must assume ordinary responsibilities. The malicious utterance of defamatory statements in *any form* cannot be condoned, and unions should adopt procedures calculated to prevent such abuses.

383 U.S. at 63, 86 S. Ct. at 663, 15 L.Ed.2d at 590 (emphasis added). Clearly, in the case at bar, the Local and International union failed to adopt "procedures calculated to prevent such abuses," and instead authorized and condoned a daily bombardment of insults and epithets.

This Court reaffirmed its decision in *Linn* in *Austin*, *supra*, stating that there are definite limits to free speech in a labor dispute. Justice Marshall, writing for the majority, emphasized that "[t]he *sine qua non* of recovery for defamation in a labor dispute under *Linn* is the existence of falsehood" or reckless disregard for truth. 418 U.S. at 283, 94 S. Ct. at 2781, 41 L.Ed.2d at 761. In the case now before the Court, the Respondents made utterances directed toward the Petitioners which were knowingly defamatory, malicious, and intentional, and which, furthermore, were made with reckless disregard for the truth. Respondents knew that the names they called Petitioners were untruths, and it is obvious that

Respondents intended to cause Petitioners harm and keep them from working. Thus, the standards of *Linn* and *Austin*, as well as § 8.01-45 and § 40.1-53 of the Code of Virginia (1950), as amended, have been met.

Certainly, the word "nigger," when used toward a black person, and the words "bastard" and "son-of-a-bitch," combined with "motherfucker" and "cocksucker," are ones which, by their usual construction and common acceptation, are construed as insults tending to violence and breach of the peace. *Felvey v. Shaffer*, 186 Va. 419, 42 S.E.2d 860 (1947). This is particularly true where the name-calling by the strikers, Respondents herein, consisted of the use of these words on a daily basis over several months throughout the duration of the strike.

The Supreme Court of Virginia, in *Carwile v. Richmond Newspapers*, 196 Va. 1, 82 S.E.2d 588 (1954), and the United States District Court, in *Marsh v. Commercial & Savings Bank of Winchester*, 265 F. Supp. 614 (W.D. Va. 1967), found that an action under the Insulting Words Statute is treated precisely as an action for libel or slander, or for words actionable per se, with one exception, namely, no publication is necessary. Hence, in Virginia, an action under the Insulting Words Statute is treated exactly like a common law action for libel or slander. *See also O'Neil v. Edmonds*, 157 F. Supp. 649 (E.D. Va. 1958). The fact that the words here were used during a labor dispute should not bar recovery for their malicious use.

It is most important to keep in mind that the Insulting Words Statute in Virginia is very clear in defining the class of words which are insulting as those which are so classified by their "usual construction and common accep-

tance as to be "fighting words," words which were determined to be actionable in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L.Ed. 1031 (1942). In that case, this Court, citing *Cantwell v. Connecticut*, 310 U.S. 296, 309-10, 60 S. Ct. 900, 906, 84 L.Ed. 1213, 1221 (1940) said:

> . . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "*Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution*, and its punishment as a criminal act would raise no question under that instrument."

315 U.S. at 571-72, 62 S. Ct. at 769, 86 L.Ed. at 1035 (emphasis added) (footnotes omitted). Thus, this Court has long recognized that the social interest in order and morality outweighs any value that might be derived from the use of that language, including open and robust debate in a labor dispute.

Contrary to the opinion of the majority of the Virginia Supreme Court, there are in fact restraints on the use of language which is abusive and insulting when directed at

an individual during a labor dispute. It is inconceivable that this Court would permit *Linn* and *Austin* to stand for the principle that an individual can say anything he wants to say of another individual without subjecting himself to civil liability for abusive, profane or insulting language. *Linn* and *Austin* adopted the *New York Times*[2] standard of malicious intent and reckless disregard for the truth. The statements made by Respondents, and testified to at trial, are libelous assertions about the Petitioners' characters and backgrounds and, in some cases, are maliciously insulting from a racial standpoint.

The real issue, with respect to the cause of action for violation of the Insulting Words Statute, and damages for use of the words used by the Respondents toward the Petitioners, is whether those words were racial insults or were epithets concerning the Petitioners' sexual preferences and parentage. What was said was clearly defamatory and cannot be considered non-libelous hyperbole. These bald assertions on their face were so irresponsible that it can hardly be contended that they were not made with a reckless disregard for the truth. Even the nature of the strike does not and cannot justify the use of the type of language that was testified to at trial. Clearly, the intent of the defendants was maliciously to cast in a bad light, with other members of the community, the individuals against whom the language was directed and, by so doing, to cause them great emotional distress.

Malice means an intent and willingness to vex, harass, annoy, or injure another person. Malice may be shown

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[2] *New York Times Company v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964).

by direct evidence of declarations of hatred or ill-will or it may be inferred from acts and conduct, such as by showing that a person's conduct was wilful, intentional, and done in reckless disregard of its possible results. Since the only logical conclusion, in the absence of evidence to the contrary, is that the use by Respondents of insulting and vile language toward Petitioners in a degrading context was malicious; and since these statements were made recklessly, without regard to their truthfulness, the *New York Times* standard has been met in this case and damages should be awarded for the use of those words.

The type of conduct present in this case is that conduct from which this Court, in *Farmer v. United Brotherhood of Carpenters, Local 25*, 430 U.S. 290, 97 S. Ct. 1056, 51 L.Ed.2d 338 (1977), found that a state was authorized to protect its citizens. In *Farmer*, this Court said that the state could prohibit that type of conduct which was "so outrageous that 'no reasonable man in a civilized society should be expected to endure it.'" 430 U.S. at 302, 97 S. Ct. at 1064, 51 L.Ed.2d at 351.

As Justice Russell, speaking for the minority in the decision below in this case, so ably said:

> [W]e tell the outraged victim to go to law. We tell him that the insulting words statute, Code § 8.01-45, is the remedy provided by our social compact, and that in lieu of any right of self-help which he might have enjoyed in a primitive society, the civilized State in which he lives will permit him to recover such compensatory and punitive damages as a jury of his peers may think the outrage worth.

App. A, pp. 28a-29a (footnote omitted).

In discussing the impact of *Farmer* on the preemption question, Justice Russell said:

> The plurality opinion considers *Letter Carriers* to be controlling, makes no mention of later decisions, and gives no consideration to the overriding state interest in preserving internal peace and public order from the threat of violence ignited by true "fighting words." The plurality merely concludes that the foul epithets shouted by the defendants here would not "support liability" because nobody would believe them to be true, and federal labor law had preempted the plaintiffs' remedy in any event. That interpretation ignores a distinction between "fighting words" and defamatory words which the United States Supreme Court has recognized for over forty years.
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> * * *
>
> *Farmer v. Carpenters*, . . . decided three years after *Letter Carriers* but not mentioned by the plurality, is controlling on the issue of federal preemption. There, a dissident worker recovered damages from a union for inflicting severe emotional distress by, among other things, subjecting him to "frequent public ridicule" and "incessant verbal abuse." . . . . The Supreme Court unanimously reversed, refusing to apply the preemption doctrine to activity that touched "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act."

App. A, pp. 29a-31a (citations omitted).

In a case similar in nature to this one, *Caterpillar Tractor Company*, 276 NLRB No. 151 (1985), the

(1985), the National Labor Relations Board recognized the necessity to prohibit insulting language and to permit punishment for it. In that case, the Board said that insulting, obscene attacks need not be tolerated, and further found that they were not protected by the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* Likewise, in the case at bar, the insulting and obscene language cannot be tolerated and is not protected by the Act. The Board also found, in *Clear Pine Mouldings, Inc.*, 268 NLRB No. 173, 115 LRRM 1113 (1984), that words by themselves were enough to warrant discharge.

Taking into consideration all of the circumstances under which the language complained of was uttered, including the duration and continuing nature of it, this Court should accept this Petition For A Writ Of Certiorari and should subsequently reverse the decision of the Supreme Court of Virginia.

CONCLUSION

In conclusion, the decision of the Supreme Court of Virginia reversing the $99,000 damage award of the trial court for use of insulting words under the applicable Virginia statute should be reversed and the damage award reinstated by this Court. The decisions of this Court require a reversal of that decision.

FOR THESE REASONS, Petitioners pray that a Writ of Certiorari issue to review and reverse the decision of the Supreme Court of Virginia.

Respectfully submitted,

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APPENDICES

APPENDIX A

Decision of the Supreme Court of Virginia

October 11, 1985

IN THE
SUPREME COURT OF VIRGINIA

PRESENT: All the Justices

LARRY CRAWFORD, *et al.*

v.

UNITED STEELWORKERS, AFL-CIO, *et al.*

Record No. 820922

KERMIT STEVERS

v.

G. W. KEFFER, *et al.*

Record No. 820938

M. E. COLLINS, *et al.*

v.

LARRY CRAWFORD, *et al.*

Record No. 820948

OPINION
BY
JUSTICE
JOHN CHARLES
THOMAS

October 11, 1985

FROM THE CIRCUIT COURT OF GILES COUNTY
Kenneth I. Devore, Judge

I. Background

These three appeals arise out of a protracted, hotly contested labor dispute. In August 1977, United Steelworkers of America, AFL-CIO, Local 14948 (the Local), with approval of its parent organization, United Steel-

workers of America AFL-CIO (the International), went on strike against Virginia Lime Company (Virginia Lime). The strike lasted eighteen months. Shortly after the strike began, Virginia Lime, in a proceeding separate from these appeals, secured an injunction against the Local to curtail improper conduct on the picket line. However. even after the injunction, complaints of wrongful activities on the part of the Local and its members continued.

The alleged wrongful activities served as the bases for the multi-count motion for judgment filed below. The plaintiffs[1] were individuals who worked at Virginia Lime while the strike was underway. In order to get to and from work, these individuals crossed the Local's picket line. The plaintiffs below are the appellants in Record No. 820922.

In their suit, the plaintiffs sought injunctive relief and money damages against the Local, the International, and certain individuals,[2] all of whom, save one, were members of the Local. Plaintiffs contended, in summary, as follows: that the suit arose under Code § 8.01-45 (generally referred to as the insulting words statute), as well as under the common law of Virginia; that the Local acted as agent for the International in all events complained of, thereby rendering the International responsible for

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[1] The plaintiffs were Larry Crawford, Thomas E. Dudley, Charles Eaves, G. W. Keffer, Michael D. Kellison, Raleigh Newby, James E. Noonkester, Richard Lee Spicer, and Lewis H. Vaughn.

[2] The individual defendants were M. E. Collins, J. M. Radford, W. E. Sessor, Linwood Stewart, C. E. Fields, L. A. Higgenbotham, W. T. Link, K. W. McManama, D. W. Myers, L. R. Simpkins, Russell B. White, Jr., Jessie William Stevers, and Kermit Stevers. Kermit Stevers was the only defendant who was not a member of the Local.

the acts and omissions of the Local; that defendants violated the terms of a September 3, 1977 injunction which set forth rules regarding picketing; that defendants threatened plaintiffs with death and/or great bodily harm whenever any of the plaintiffs entered or exited Virginia Lime; that certain of the plaintiffs were shot at by certain of the defendants; that the defendants assaulted and battered the plaintiffs; that the defendants restrained or attempted to restrain the plaintiffs from exercising their right to free and unimpeded movement to and from the property of Virginia Lime; that the defendants violated Code § 8.01-45 by the use of insulting and abusive words aimed at the plaintiffs; and that the defendants intentionally inflicted emotional distress on the plaintiffs.

The case went to trial on May 26, 1981. After considering extensive and conflicting testimonial evidence, the trial court rejected virtually all of plaintiffs' contentions. More specifically, the court ruled as follows: that the motion to strike of defendants Russell B. White, L. A. Higgenbotham, C. E. Fields, W. T. Link, K. W. McManama, D. W. Myers, and L. R. Simpkins was granted; that the Local acted as agent for the International; that the words "scab," "scabby," "nigger," "bastard," and "son-of-a-bitch" were not actionable under Code § 8.01-45; that the words "cocksucker" and "motherfucker" were actionable under Code § 8.01-45; that there was no violation of Code §§ 40.1-53, 40.1-66, or 40.1-67, which concern picketing and right to work; that there was no intentional infliction of emotional distress; that there was no assault and battery; and that certain specified plaintiffs were entitled to recover from certain specified defendants $1,000.00 in compensatory damages and

$10,000.00 in punitive damages. The three instant appeals question different aspects of the trial court's order.

In the first appeal, Record No. 820922, the original plaintiffs raise three issues which have been properly preserved for review by this Court: (1) whether the trial court erred in failing to find violations of Code §§ 40.1-53, 40.1-66, and 40.1-67; (2) whether the trial court erred in failing to find intentional infliction of emotional distress; and (3) whether the trial court erred in sustaining the motion to strike of White, Higgenbotham, Fields, Link, McManama, Myers, and Simpkins.

On brief, the original plaintiffs also assigned error to the trial court's ruling that the words "nigger," "bastard," and "son-of-bitch" were not actionable, and its failure to award damages for assault and battery. However, those matters were not mentioned in oral argument and counsel did not rely on his brief with regard to them. Therefore, in keeping with settled practice in the Commonwealth, we will not consider them here. *See Stevens* v. *Ford Motor Co.*, 226 Va. 415, 417 n., 309 S.E.2d 319, 320-21 n. (1983). *See Also* Rule 5:35(d) effective August 1, 1985.

In the second appeal, Record No. 820938, Kermit Stevers, the only defendant not a member of the Local, appealed separately and raised the following issues which have been properly preserved for review by this Court: (1) whether the trial court erred in imposing liability on the basis of Code § 8.01-45, in that the two words found actionable were not defamatory; (2) whether the trial court erred in imposing liability on the basis of Code § 8.01-45, in that federal law preempts matters of defamation within a labor context; and (3) whether the trial

court erred in imposing liability on the basis of Code § 8.01-45, in that such liability is barred by the First Amendment.

Stevers made three additional assignments of error. Two concern sufficiency of the evidence of his liability. The other contends that, within the labor context, punitive damages are barred by the First Amendment. However, these three matters were not mentioned in oral argument and counsel did not rely on his brief with regard to them. Therefore, the three additional issues will not be considered. *Stevens*, 226 Va. at 417 n., 309 S.E.2d at 320-21 n.

In the third appeal, Record No. 820948, the Local, the International, and the four other individual defendants who were found liable by the trial court raised the following issues which were properly preserved for review by this Court: (1) whether the trial court erred in imposing liability on the basis of Code § 8.01-45, in that the two words found actionable were not defamatory; (2) whether the trial court erred in imposing liability on the basis of Code § 8.01-45, in that federal law preempts matters of defamation within a labor context; (3) whether the trial court erred in imposing liability on defendants in violation of the First Amendment; (4) whether the trial court erred in holding the Local and International liable on common law agency principles; and (5) whether the trial court erred in holding the Local and International liable in light of the First Amendment and federal preemption of labor law.

The appellants in the third appeal made three additional assignments of error. One concerned sufficiency of the evidence and the two others concerned the award of

punitive damages. However, these three matters were not mentioned in oral argument and counsel did not rely on his brief with regard to them. Therefore, we will not consider them. *Stevens*, 226 Va. at 417 n., 309 S.E.2d at 320-21 n.

Though from a technical standpoint this opinion must dispose of three appeals, the matter is simpler than that. The original plaintiffs contend, in essence, that relief should have been granted on more than a single ground and against more defendants. On the other hand, the defendants, those found liable, contend that they should not have been found liable on any ground. For reasons set forth below, we think the defendants are correct.

II. Facts[3]

The strike began on August 26, 1977, following a strike vote by the Local. On September 3, 1977, Virginia Lime secured an injunction against the strikers. The injunction laid down rules for the continuation of the strike. In November 1977, the Local voted to continue the strike. The strike was occasioned by acts of violence and intimidation. Ultimately, according to representations in oral argument, the Local and International

[3] The statement of the facts in these appeals is atypical for two reaons. First, the plaintiffs did not assert a common claim as to the several defendants. Instead, though many of the claims were similar, each individual plaintiff proved a separate and distinct set of facts against one or more of the defendants. Consequently, we, of necessity, must present nine separate factual accounts. Second, the plaintiffs prevailed on only a very limited portion of their claim. Thus, some of the facts must be viewed in favor of the plaintiffs while the others must be viewed in favor of defendants. As a result, we will summarize the facts as adduced by both sides.

were decertified as bargaining agents for the workers at Virginia Lime.

Larry Crawford testified about wrongful acts directed towards him. When he first went to the Virginia Lime plant to apply for work, he was stopped at the picket line where defendant Russell B. White told Crawford that the union was on strike and Crawford should "get the hell out of there." Kermit Stevers, another defendant, shot the "bird"[4] at Crawford, tried to run Crawford off the road, and called Crawford a "scab," "scabby son-of-a-bitch," and "bastard." Crawford said that William (Bill) Stevers also tried to run him off the road. William E. (Vick) Sessor called Crawford an "ugly-looking cock-sucking bastard" and was present when a burning stick was thrown at Crawford's vehicle. Crawford said that as he went to and from work at Virginia Lime he was repeatedly called "son of a bitch," "motherfucker," or "bastard;" he was unable to identify any specific individual as having made these remarks.

Crawford said he felt threatened by the abusive language and the burning stick. He said also that as a result of the wrongful acts done to him he lost sleep, and became tense and anxious.

In response to Crawford's contentions, White did not testify. In his testimony, Kermit Stevers made no specific reference to Crawford's allegations. He did, however, admit to using curse words on occasion and also, on

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[4] The "bird" is defined as "an obscene gesture of contempt made by pointing the middle finger upward while keeping the other fingers down." Webster's Third New International Dictionary, Unabridged (1981), Addenda at 60a.

occasion, making a gesture he called the "bird." Vick Sessor made no specific reference to Crawford in his testimony. Vick Sessor did admit, however, that while he was on the picket line he overheard such words as "bastard, son-of-a-bitch, motherfucker." These are the precise words Crawford said were used against him, although he did not know who spoke them. Sessor also admitted that on occasion he used curse words. But he explained that he cursed back to others who first cursed him.

Thomas E. Dudley's evidence was as follows: He said that on crossing the picket line he was repeatedly cursed and called such things as "scab," "scabby son of a bitch," and "motherfucker." Dudley said that Jewel Radford attempted to run him off the road and that on separate occasions, Kermit Stevers also attempted to run him off the road. Vick Sessor hollered at Dudley, shot the "bird" at him, and called him such names as "motherfucker," "scab," and "scabby son of a bitch." Lynn Higgenbotham also cursed Dudley, and called him "scab" and "scabby son of a bitch." Dudley said that on one occasion, while driving from the plant, he saw a gun pointed at his vehicle; he did not say who pointed the gun.

As a result of the events to which he testified Dudley became scared, nervous, depressed, and tense. Phyllis Dudley, plaintiff's wife, testified that her husband "became nervous and irritable," "snap[ped] at the children," and "went from 1 1/2 packs to 3 packs of cigarettes per week."

In response to Dudley's testimony, Jewel Radford denied running anyone off the road. He also denied cursing anyone at the picket line. Vick Sessor said he did not recall running Dudley off the road. He admitted, how-

ever, that curse words were used on the picket line, but he contended such language was used by both sides. Higgenbotham did not make specific reference to Dudley's charges. However, he generally denied any wrongdoing.

Charles Eaves testified that he was called "bastard" and "cocksucker" on crossing the picket line. He said he was cursed almost every time he crossed the line. He was unable to say who called him those names. Jessie William (Bill) Stevers saw Eaves at the picket line and said, "You black nigger son of a bitch we'll get you." Marvin E. (Buddy) Collins threatened Eaves with a hammer and told him "We'll get your damn ass." Collins also said "We'll get you, motherfucker nigger." In addition, Vick Sessor said to Eaves, "We'll get your black ass." Jewel Radford drove in front of Eaves on the highway and "stomped" on his brakes. Eaves got nails in his tires on crossing the picket line.

Eaves became nervous as a result of the acts directed at him. He started drinking heavily and couldn't sleep. He carried a gun for fear of being shot.

In response to Charles Eaves' testimony, Bill Stevers made no specific reference to Eaves but generally denied any wrongdoing. Buddy Collins denied threatening Eaves with a hammer and generally denied the allegations against him. Though Jewel Radford did not mention Charles Eaves by name, he denied running anyone off the road.

G. W. Keffer described several incidents in which he was victimized. In one incident, Keffer was hauling lime from the plant. Charlie Fields stepped into the road and

raised a club as if to hit the windshield; apparently, upon recognizing Keffer, Fields lowered the club and stepped back. On another occasion, Higgenbotham, Radford, Collins, McManama, and two others blocked the road preventing Keffer from hauling a load of lime. Keffer's windshield was shot out by Kermit Stevers. Kermit also said over a "C.B." radio to Keffer, "There's that scabby SOB," "[w]e'll stop you from hauling that lime out of there." Indeed, every time Kermit Stevers passed Keffer on the road Stevers called Keffer a "son of a bitch." Bill Stevers, Vick Sessor, Lynn Higgenbotham, and Kenneth McManama, on different occasions, called Keffer a "scabby son of a bitch" and said they were going to get Keffer. McManama and Blevins (not a defendant) got on a C.B. radio and said to Keffer, "You scabby SOB, we'll get you tonight. We'll burn your barn; its Halloween tonight."

Keffer said he received threatening calls every night. He said the activities aimed at him made him nervous and caused uneasiness in his stomach. According to Keffer's daughter-in-law, he became more nervous, irritable, grouchy and preoccupied. She said he was grouchy with his grandchildren.

In response to Keffer's testimony, Charles Fields specifically denied that he raised a club as if to hit Keffer's windshield. Fields said that when Keffer drove by, he, Fields, was standing by the side of the road holding a whittling stick and that he made no gesture towards Keffer's truck. In his testimony, Jewel Radford made no specific reference to Keffer's charges concerning a roadblock. McManama likewise made no specific reference to Keffer but denied threatening anyone. Neither Higgenbo-

tham nor Radford said anything specific about Keffer's testimony; they simply denied any wrongdoing. Kermit Stevers did not specifically deny shooting out Keffer's windshield or cursing Keffer; however, he generally denied any involvement in the strike. In his testimony, Vick Sessor made no specific references to Keffer's testimony; he did, however, admit hearing and using curse words while on the picket line. Bill Stevers did not make a specific response to Keffer's testimony; however, he denied any wrongdoing. The same is true for Higgenbotham and McManama. Blevins, who was not a defendant, did not testify.

Michael Kellison said his truck windows were shot out as he drove away from the picket line. Bill Stevers did the shooting. Vick Sessor said to Kellison, "You scabby son of a bitch, we're going to get you." Sessor met Kellison on the highway, drove on Kellison's bumper and continually flashed his lights from bright to dim. Kermit Stevers followed Kellison on the highway with bright lights on. This went on for two to three miles. Once, while leaving the plant, Kellison's truck was stopped by Bill Stevers and another; the men tried to open his doors. When they learned that Kellison had applied for a job, Bill Stevers called him a "son of a bitch." A shooting incident followed. Kellison said that when he crossed the picket line all of the picketers called him "son of a bitch," "bastard," and "cocksucker."

Kellison said he cannot sleep and does not go out as he did formerly. His wife said he used to sleep well; however, now he tosses and turns and keeps a gun.

In response to Michael Kellison's testimony, Bill Stevers specifically denied shooting into Kellison's truck and

generally denied any other wrongdoing. Vick Sessor made no specific reference to Kellison's testimony. However, he admitted cursing on the picket line, on occasion; but generally denied any wrongdoing. Kermit Stevers denied tailgating Kellison with his bright lights on and generally denied any involvement in the strike.

McManama yelled out from the picket line within Raleigh Newby's hearing that he hoped "that nigger has good life insurance." That evening McManama followed Newby into town. Vick Sessor, Bill Stevers, Kermit Stevers, Jewel Radford, and Linwood (Chuckie) Stewart all called Newby "nigger," "motherfucker," "black son of a bitch," and "bastard." Jewel Radford called Newby "nigger, son of a bitch," and "no good motherfucker." Newby was shot at in the parking lot at Virginia Lime but does not know by whom. He also got nails in his tires.

The events Newby described caused Newby to become scared, nervous, and depressed. His wife said he is really nervous, withdrawn from the children, does not sleep well, and is irritable.

In response to Raleigh Newby's testimony, Kenneth McManama denied making the statement ascribed to him by Newby. McManama claims he merely asked, out of curiosity, whether Newby's and another's group insurance was still in effect. McManama denied threatening anyone. Vick Sessor made no specific response to Newby's charges; however, he admitted that while on the picket line he overheard words such as "bastard, son-of-a-bitch, motherfucker." He even admitted that on occasion he used curse words while on the picket line. Jewel Radford did not make specific reference to Newby's tes-

timony; however, he generally denied cursing anyone at the picket line.

Vick Sessor called James Noonkester an "ugly looking cocksucking bastard." Noonkester's brake line was cut and, at that time, Noonkester saw Kermit Stever's truck in the vicinity. Noonkester picked up nails in his tires. He believed Charles Fields was responsible for placing the nails in the road. Once, when Noonkester crossed the picket line, a burning stick was thrown at his car.

As a result of the foregoing, Noonkester became nervous, lost sleep, developed a heart condition, and became irritable with his family. He took valium for his nerves and other medicine for his heart. He was unable to sleep and eat as usual.

In response to Noonkester's testimony, Vick Sessor made no specific reference to Noonkester. Sessor said he overheard, while on the picket line, such words as "bastard, son-of-a-bitch, motherfucker." He even admitted that, on occasion, he used such words. Kermit Stevers specifically denied tampering with Noonkester's brakes. Charles Fields denied putting nails in the road.

Richard Spicer was cursed every day and night he went in, called such names as "scabby son of a bitch," "cocksucker," "bastard," and "motherfucker." Jewel Radford stepped in front of Spicer's truck and said, "I'll get you, you scabby bastard." Vick Sessor called Spicer a "scabby son of a bitch." The same thing was said by Higgenbotham. Spicer's car got stuck in snow; Higgenbotham came upon him and said, "This is what we've been waiting for you scabby son of a bitch." The next day, Spicer found all but one of the windows shot out of

his car. Someone on the picket line threw nails in the road and Spicer got some in his tires.

Spicer became nervous, sick, troubled, and upset. He suffered headaches, high blood pressure, and feared for his life.

In response to Richard Spicer's testimony, Jewel Radford, without specifically mentioning Spicer, denied cursing anyone. Vick Sessor made no specific reference to Spicer's testimony; however, he said that while on the picket line he overheard such words as "bastard, son-of-a-bitch, motherfucker." He even admitted using such words, on occasion. Higgenbotham denied cursing Spicer and denied vandalizing Spicer's car.

Lewis Vaughn was a former member of the union. He was cursed every day he crossed the picket line. He was called "scabby son of a bitch," and "scabby bastard." He got nails in his tire from the picket line. His car was shot at. Firecrackers were thrown under his car. Vick Sessor called him "a puny scabby son of a bitch." Jewel Radford, with a hammer in his hand, said, "Get out of the car and I'll knock your goddamn brains out."

Vaughn became nervous, lost sleep, developed high blood pressure, and became depressed. He received medical treatment for high blood pressure and depression. His sex life suffered.

In response to Vaughn's testimony, Vick Sessor made no specific reference to Vaughn. He did, however, admit overhearing, on the picket line, such words as "bastard, son-of-a-bitch, motherfucker." He even admitted that on occasion he used such language. Jewel Radford specifi-

cally denied threatening Vaughn. Further, Radford denied cursing anyone at the picket line.

The Local was involved in and aware of the events that took place during the strike. The Local called the strike. Jewel Radford was president of the Local and Vick Sessor was vice president. Either singly or in groups, members of the Local did many of the acts complained of by plaintiffs.

The involvement of the International is much different. The International representative recommended against striking. The Local disregarded this advice and voted to strike. The International representative advised the men to conduct themselves in an orderly fashion on the picket line. He told them not to drink and not to use abusive language. Moreover, the men were advised that if a car approached the picket line they could ask the occupant not to cross but they could not do more than that. The International representative said he was in frequent telephone contact with the Local president who advised that there were no problems. Though the International sent strike benefits to the local, the benefits were in a weekly lump-sum check which was deposited in the Local's account. Funds were disbursed to needy workers without any input or control on the part of the International.

III. Discussion

A. *Preemption*

The relief granted by the trial court was based on pure speech, not conduct, but speech—standing alone. Moreover, the speech upon which liability was based occurred in the midst of a labor dispute. Further, the trial court

did not rule that the words complained of were defamatory. Instead, the court said that the words "cocksucker" and "motherfucker" were actionable because they tend to violence and breach of the peace in violation of Code § 8.01-45. These factors all bear upon the preemption question.

On appeal, Kermit Stevers, the Local, the International, and the other defendants argue that the trial court could not award relief on the basis of the two words mentioned above because of the preemption doctrine. They argue that federal labor policy permits robust debate and the use of vile and abusive language within the confines of a labor dispute and that only knowing falsehoods or statements made with reckless disregard for their truth or falsity could serve as the basis for liability. We agree.

The rules regarding permissible speech within the context of labor disputes can be readily distilled from two leading Supreme Court opinions: *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (1966), and *Letter Carriers* v. *Austin*, 418 U.S. 264 (1974). These two opinions essentially bracket the problem, placing the upper and lower limits of state control over speech used in labor disputes.

Though in *Linn* the Supreme Court said state jurisdiction was not preempted, plaintiffs' reliance on that opinion is misplaced. This is so because *Linn* plainly set standards that were not met in the instant appeal.

Linn was an assistant general manager of Pinkerton's National Detective Agency, Inc. A campaign was underway to organize Pinkerton's Detroit employees. In the midst of that campaign, the organizers circulated a leaf-

let which accused Pinkerton's managers of certain misconduct, including depriving employees of their right to vote in certain National Labor Relations Board (NLRB or Board) elections, robbing employees of pay increases, and lying to employees. Linn sued. He alleged he was one of the managers referred to in the leaflet and that the statements concerning him were "wholly false, defamatory and untrue" and that the defendants knew the statements were untrue. Linn prayed for $1,000,000 in damages on the ground that the statements were libelous *per se*.

The district court concluded that exclusive jurisdiction lay with the Board and dismissed the complaint. The court of appeals affirmed. The Supreme Court reversed. Though the Supreme Court reversed, it carefully set forth the policy considerations that surround speech within the context of a labor dispute and described the *only* situation in which a state court could exercise jurisdiction over a defamation action arising out of such a dispute.

With regard to the policy considerations, *Linn* first focused upon the nature of labor disputes:

> *Labor disputes are ordinarily heated affairs*; the language that is commonplace there might well be deemed actionable *per se* in some state jurisdictions. Indeed, representation campaigns are *frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions*. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with *imprecatory language*.

Linn, 383 U.S. at 58, *citing Cafeteria Union* v. *Angelos*, 320 U.S. 293, 295 (1943) (emphasis added).

Next, the Court considered the NLRB's handling of speech within the context of labor disputes and concluded that the Board "has allowed wide latitude to the competing parties." *Linn*, 383 U.S. at 60. The Court also said the Board has concluded "that epithets such as 'scab,' 'unfair,' and 'liar' are commonplace in these struggles. . . ." *Id.* at 60-61. The Court summed up its review of Board treatment of speech within labor disputes as follows:

> [A]lthough the Board tolerates intemperate, abusive and inaccurate statements made by the union during attempts to organize employees, it does not interpret the Act as giving either party license to injure the other intentionally by circulating defamatory or insulting material known to be false. . . . In such case the one issuing such material forfeits his protection under the Act.

Id. at 61 (citations omitted).

The Court then focused on Congressional policy regarding "union speech." In that regard the Court recognized "a congressional intent to encourage free debate on issues dividing labor and management." *Id.* at 62. It made reference to this nation's profound commitment to uninhibited, robust, and wide-open debate, debate that "may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *Id.*, *quoting New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). The Court then concluded by saying that "*the most repulsive speech enjoys immunity* provided it falls short of a delib-

erate or reckless untruth." *Linn*, 383 U.S. at 63 (emphasis added).

In order to effectuate the policy concerns discussed in *Linn*, the Court concluded that state libel actions were preempted in all but a narrow class of cases. Such state proceedings were held permissible only where they were limited to "redressing libel issued with knowledge of its falsity, or with reckless disregard of whether it was true or false." *Id.* at 61. The Court adopted by analogy, for use in such cases, the *New York Times Co. v. Sullivan* standards. *Linn*, 383 U.S. at 65.

Thus, *Linn* established a rule of partial preemption. Finally, *Linn* expressly reserved the right to consider, in a future case, whether total preemption of such cases was the only effective method of protecting the policy concerns announced in *Linn*. *Id.* at 67.

In *Letter Carriers*, the Court, applying the principles announced in *Linn* to facts somewhat similar to those in the instant appeal, broadened the sweep of preemption in this class of cases. *Letter Carriers* was a Virginia case, 213 Va. 377, 192 S.E.2d 737 (1972). There, a postal worker, who was not a member of the postal union, complained that his name was repeatedly listed in a union newsletter under the heading, "List of Scabs," and that the definition of scab[5] supplied by the newsletter,

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[5] The definition reads as follows:

> After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which He made a scab.
>
> A scab is a two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue.

including such words as "traitor," was false and defamatory. This Court agreed and upheld damage awards to Austin and two others. The Supreme Court reversed.

The Supreme Court said that the issue in *Letter Carriers* was "the extent to which state libel laws may be applied to penalize statements made in the course of labor disputes without undermining the freedom of speech which has long been a basic tenet of federal labor policy." *Letter Carriers*, 418 U.S. at 270. In resolving this issue, the Court made a careful review of *Linn*, in which it reemphasized the concerns expressed there that "unrestricted libel actions under state law could easily interfere with federal labor policy;" that Congress and the NLRB had expressly fostered the "freewheeling use of the written and spoken word" in labor disputes; and that federal policy favored "uninhibited, robust and wide-open de-

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> Where others have hearts, he carries a tumor of rotten principles.
>
> When a scab comes down the street, men turn their backs and Angels weep in Heaven, and the Devil shuts the gates of hell to keep him out.
>
> No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his Master, he had character enough to hang himself. A scab has not.
>
> Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. *The scab sells his birthright, country, his wife, his children and his fellow-men for an unfulfilled promise from his employer.*
>
> *Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class!*
>
> *Letter Carriers*, 418 U.S. at 268 (emphasis in original).

bate in labor disputes. . . ." *Letter Carriers*, 418 U.S. at 271, 272, and 273.

Next, *Letter Carriers* made clear that *Linn* is to be given broad, not narrow, application. Justice Marshall said that the application of Linn cannot turn on some abstract notion of a labor dispute; instead, "application of *Linn* must turn on whether the defamatory publication is made in a context where the policies of the federal labor laws leading to protection for freedom of speech are significantly implicated." *Letter Carriers*, 418 U.S. at 279.

After setting forth the foregoing items, the Supreme Court explained that *Letter Carriers* had to be reversed for two reasons: first, because a jury instruction defining malice did not comport with *New York Times Co.* v. *Sullivan*, and second, because, upon the Court's independent analysis, the allegedly defamatory statements were not false statements of fact and thus could not support liability.

The second basis for reversing *Letter Carriers* is the primary reason we must reverse the judgment entered in favor of plaintiffs by the trial court in the instant case. In *Letter Carriers*, Austin argued that the definition of "scab" charged him with having "rotten principles," lacking "character," and being a "traitor." Austin said those statements were untrue and that the union knew they were untrue. The Supreme Court rejected his argument. The Court explained that "*Linn* recognized that federal law gives a union *license to use intemperate, abusive, or insulting language* without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point." *Letter Carriers*, 418 U.S. at 283. It then said

that the "*sine qua non* of recovery for defamation in a labor dispute under *Linn* is the existence of falsehood." *Letter Carriers*, 418 U.S. at 283.

The Court concluded that the language complained of by Austin could not be construed as representations of fact. *Id.* at 284. According to the Court, the language complained of by Austin was merely "loose language" and that to use such language is not to falsify facts.

> The definition's use of words like "traitor" cannot be construed as representations of fact. As the Court said long before *Linn*, in reversing a state court injunction of union picketing, "*to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like 'unfair' or 'fascist'—is not to falsify facts.*" *Cafeteria Employees Local 302* v. *Angelos*, 320 U.S. 293, 295 (1943). Such words were obviously used here in a loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who oppose unionization. *Expression of such an opinion, even in the most pejorative terms, is protected under federal labor law.*

Id. at 284 (emphasis added). In support of this view, the Court also cited *Greenbelt Cooperative Publishing Assn.* v. *Bresler*, 398 U.S. 6 (1970). In *Bresler*, a plaintiff had recovered because an action he took was described as "blackmail." The Court said use of the word "blackmail" could not be the basis of a libel judgment because the word did not convey a false statement of fact. The court wrote:

> "It is simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable."

Letter Carriers, 418 U.S. at 285, *quoting Bresler*, 398 U.S. at 14 (footnote omitted). *See also Curtis Publishing Company* v. *T. B. Birdsong*, 360 F.2d 344 (5th Cir. 1966) (Court of Appeals said use of the word "bastard" to describe police could not reasonably have been read to accuse the plaintiffs of having been born out of wedlock). *Letter Carriers* reasoned it was likewise impossible for any reader to think that Austin was being accused of the criminal offense of treason. *Letter Carriers*, 418 U.S. at 285.

By the same token, the words upon which the trial court fashioned liability here will not support recovery. The words are disgusting, abusive, repulsive, and are in no way condoned by this Court. Nevertheless, they cannot reasonably be understood, under the circumstances of this labor dispute, to convey a false representation of fact. To call a person a "cocksucker" does not, under the circumstances of this labor dispute, convey the false representation that the individual engaged in sodomy. Nor does calling a person a "motherfucker," under the

circumstances of this case convey the false representation that the person engaged in incest. Because this was a labor dispute and considering the way in which the words were used, these repulsive words will not support liability. The trial court should have stricken the claim based on violation of Code § 8.01-45.

B. Plaintiffs' Other Theories of Liability

1. *Violation of Picketing and Right to Work Statutes*

The plaintiffs contend the trial court erred in failing to find a violation of Code §§ 40.1-53, -66, and -67. The trial court said it found no liability on the part of any defendants for violation of the cited code sections. The trial court made the correct ruling with regard to these matters.

Code § 40.1-53 provides as follows:

> No person shall singly or in concert with others interfere or attempt to interfere with another in the exercise of his right to work or to enter upon the performance of any lawful vocation by the use of force, threats of violence or intimidation, or by the use of insulting or threatening language directed toward such person, to induce or attempt to induce him to quit his employment or refrain from seeking employment.
>
> No person shall engage in picketing by force or violence, or picket alone or in concert with others in such manner as to obstruct or interfere with free ingress or egress to and from any premises, or obstruct or interfere with free use of public streets, sidewalks or other public ways.

> Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and punished accordingly.
>
> Notwithstanding the punishments herein provided any court of general equity jurisdiction may enjoin picketing prohibited by this section, and in addition thereto, may enjoin any picketing or interference with lawful picketing when necessary to prevent disorder, restrain coercion, protect life or property, or promote the general welfare.

This statute does not provide for a civil action for damages. It is a quasi-criminal statute, the violation of which is punishable as a misdemeanor. In addition to providing for criminal penalties, it also provides for injunctive relief. We will not read more into the statute than is written. The trial court was correct in finding no liability since the statute did not provide for the relief sought by plaintiffs.

Code §§ 40.1-66 and -67 are part of Article 3 of Chapter 40 which is concerned with "Denial or Abridgement of Right to Work." Code § 40.1-66 provides as follows:

> Any person, firm, association, corporation, or labor union or organization engaged in lockouts, layoffs, boycotts, picketing, work stoppages or other conduct, a purpose of which is to cause, force, persuade or induce any other person, firm, association, corporation or labor union or organization to violate any provision of this article shall be guilty of illegal conduct contrary to public policy; provided that nothing herein contained shall be construed to prevent or make illegal the peaceful and orderly solicitation and persuasion by union members of others to join a union, unaccompanied by any intim-

> idation, use of force, threat of use of force, reprisal or threat of reprisal, and provided that no such solicitation or persuasion shall be conducted so as to interfere with, or interrupt the work of any employee during working hours.

Code § 40.1-67 sets forth relief available for violation of § 40.1-66 or any other provisions of Article 3. It reads as follows:

> Any employer, person, firm, association, corporation, labor union or organization injured as a result of any violation or threatened violation of any provision of this article or threatened with any such violation shall be entitled to injunctive relief against any and all violators or persons threatening violation, and also to recover from such violator or violators, or person or persons, any and all damages of any character cognizable at common law resulting from such violations or threatened violations. Such remedies shall be independent of and in addition to the penalties and remedies prescribed in other provisions of this article.

Given the language of these two provisions, the plaintiffs could have alleged a cause of action for money damages based on the violation of § 40.1-66. However, we read the trial court's decision to be a factual finding that plaintiffs did not prove their claim.

We have reviewed the conflicting evidence in this case. We cannot say that the trial court's conclusion is plainly wrong or without evidence to support it. Therefore, we must affirm its decision which found no liability on the part of any defendant for the violation of Code §§ 40.1-66 and -67.

2. Intentional Infliction of Emotional Distress

In its Final Order the trial court found "no liability on the part of any Defendant for intentional infliction of emotional distress." The plaintiffs say this was error. We disagree; in our view the ruling must be affirmed.

The parties agree that *Womack* v. *Eldridge*, 215 Va. 338, 210 S.E.2d 145 (1974), sets forth the rules for recovery for intentional infliction of emotional distress absent physical injury. But as appellees in appeal No. 820922 argue, the court's ruling was factual, not legal. In the trial court's view, the plaintiffs did not prove their case on this issue. The evidence was in conflict as to the nature and extent of defendants' behavior. Consequently, we cannot say that the trial court's conclusion was plainly wrong. We will affirm its decision denying recovery for intentional infliction of emotional distress.

IV. Conclusion

In light of the foregoing rulings, we need not consider the other issues raised by these appeals. As a result of our rulings, the judgments in favor of plaintiffs will be reversed and final judgments for defendants entered here.

Record No. 820922 - *Affirmed.*
Record No. 820938 - *Reversed.*
Record No. 820948 - *Reversed.*

Cochran, J., concurring.
Russell J., dissenting. Carrico, C.J. and Stephenson, J., join in dissent.

Russell, J., dissenting:

I disagree with both the plurality opinion and the concurring opinion. The language used by the defendants is intolerable by any civilized standard. Taxes, military service, and conformity to the law may be a high price to pay for life in an orderly society, but the compensating benefits of peace and public order are thought by most citizens to be worth the price. Internal peace and public order, indeed, are the principal benefits the State has to offer us in exchange for its numerous constraints on our freedom to do and say precisely what we want.

The words spoken by the defendants were like physical blows. They were, in themselves, foul-mouthed violence tantamount to an assault. No free man or woman should be expected to endure them without redress. Language of this kind, even in a relatively permissive age, may be expected to incite prompt retaliation. Such words are true "fighting words" because of their propensity to provoke an immediate breach of the peace, which is no trivial matter in light of the tendency of many of our citizens to keep and bear arms.

Although the victim of such a verbal assault may be justifiably outraged, our laws do not permit him to respond with physical violence. We tell the outraged victim that mere words, however grievous, will not justify a physical attack, *Roark v. Commonwealth*, 182 Va. 244, 252, 28 S.E.2d 693, 696 (1944), and that duels have been unlawful for well over two hundred years, *see Lambert's Case*, 36 Va. (9 Leigh) 603, 605 (1838). Instead, we tell the outraged victim to go to law. We tell him that the

insulting words statute, Code § 8.01-45,[1] is the remedy provided by our social compact, and that in lieu of any right of self-help which he might have enjoyed in a primitive society, the civilized State in which he lives will permit him to recover such compensatory and punitive damages as a jury of his peers may think the outrage worth.

Without suggesting an alternative, the Court today destroys that remedy. The plurality opinion, ignoring the most recent decision of the United States Supreme Court on the subject, takes the position that the remedy is preempted by federal law because the tort was committed in the course of a labor dispute. The concurring opinion, applying dicta in our former cases out of context, simply concludes that the insulting words statute does not mean what it plainly says.

In *Letter Carriers v. Austin*, 418 U.S. 264 (1974), a case arising in Virginia, a divided United States Supreme Court held that defamatory words uttered in the context of a labor dispute were protected by federal labor law in the absence of "New York Times malice." The plurality opinion considers *Letter Carriers* to be controlling, makes no mention of later decisions, and gives no consideration to the overriding state interest in preserving internal peace and public order from the threat of violence ignited by true "fighting words." The plurality merely concludes that the foul epithets shouted by the defendants here would not "support liability" because nobody would believe them to be true, and federal labor

[1] § 8.01-45: "All words shall be actionable which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace."

law had preempted the plaintiffs' remedy in any event. That interpretation ignores a distinction between "fighting words" and defamatory words which the United States Supreme Court has recognized, for over forty years.

In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Court held that the Constitution affords no protection to certain well-defined classes of speech, including the lewd and obscene and insulting or fighting words *which by their very utterance inflict injury or tend to incite an immediate breach of the peace. Id.* at 572-73. *Chaplinsky* involved an appeal from a conviction under a state law penalizing "offensive, derisive and annoying words." The New Hampshire Supreme Court, however, had narrowed the application of the law to words which "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." *Id.* at 573. Accepting New Hampshire's interpretation of its own law, a unanimous Supreme Court held that the control of verbal conduct likely to cause violence lies within the domain of state power. *Id.* at 573. *Chaplinsky* remains authoritative with regard to a state's right to control true "fighting words."

Two later cases are instructive with respect to the distinction between "fighting words" and words which are merely defamatory. In *Gooding v. Wilson*, 405 U.S. 518 (1972) and *Lewis v. City of New Orleans*, 415 U.S. 130 (1974), divided courts struck down, as vague and overbroad, state laws designed to penalize insulting words. In both cases, the majority took the position that there was danger that the laws might be employed to punish constitutionally protected speech because, and only because,

the state courts had not adopted precise definitions of the statutory terms restricting their application to true "fighting words," as New Hampshire had done in *Chaplinsky*. The message seems clear enough.

Farmer v. Carpenters, 430 U.S. 290 (1977), decided three years after *Letter Carriers* but not mentioned by the plurality, is controlling on the issue of federal preemption. There, a dissident worker recovered damages from a union for inflicting severe emotional distress by, among other things, subjecting him to "frequent public ridicule" and "incessant verbal abuse." *Id.* at 293. The union contended that its verbal onslaughts were privileged because uttered in the course of a labor dispute and that the plaintiff's state remedy was preempted by federal labor law. The state appellate court agreed with the union, taking the view that the plurality takes today. The Supreme Court unanimously reversed, refusing to apply the preemption doctrine to activity that touched "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." 430 U.S. at 296-97 (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243-44 (1959)). Justice Powell wrote, for the Court:

> Nothing in the federal labor statutes protects or immunizes from state action violence or the threat of violence in a labor dispute . . . and thus there is no risk that state damages actions will fetter the exercise of rights protected by the NLRA. On the other hand, our cases consistently have recognized the historic state interest in "such traditionally local matters as public safety and order . . . . " And, as

> with the defamation actions preserved by *Linn*, state-court actions to redress injuries caused by violence or threats of violence are consistent with effective administration of the federal scheme: Such actions can be adjudicated without regard to the merits of the underlying labor controversy.

Id. at 299-300 (citations omitted).

Thus, if our insulting words statute is restricted in its operation to true "fighting words," words having a tendency to provoke an immediate breach of the peace, as I think it is, its remedy is clearly not preempted by federal labor law.

The concurring opinion relies on dicta in a line of cases beginning with *W. T. Grant Co. v. Owens*, 149 Va. 906, 141 S.E. 860 (1928), to hold that the insulting words statute is assimilated to an action for libel or slander *for all purposes*, and that it thus affords no remedy for true "fighting words," notwithstanding the express terms of the statute.

That view overlooks the profound difference between true "fighting words" and words which are merely defamatory. "Fighting words," such as those used here, do not tend to injure the victim's reputation, character, social standing, or means of earning a living. Rather than degrading the victim in the estimation of his peers, "fighting words" may arouse sympathy for him in bystanders who overhear the words and provoke them to join with him in a prompt and violent assault on the speaker. The State's interest in controlling such words is the paramount one of preserving public peace and order in the community. By contrast, defamatory words are actionable because of the injury they do to the victim's

private reputation, and the State's interest in them extends only to affording its citizens a just remedy for their private injuries.

We have said repeatedly, in the context of words merely defamatory in character, that an action under the insulting words statute is assimilated to a common-law action for libel and slander. But we have never made that statement in a true "fighting words" case, this being the first such case to come before us since we decided *W. T. Grant* in 1928. An analysis of the facts in all the cases based on the insulting words statute which have come before us since *W. T. Grant* makes clear that each of them, including all those relied on by the concurring opinion, involved words which were either defamatory *per se* or *per quod*; and, if published, would have formed a basis for a common law action for libel or slander independent of the insulting words statute.[2]

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[2] Since 1928 when this Court stated in *W.T. Grant* that an action for insulting words is completely assimilated to the common law action for libel and slander, 52 cases involving the insulting words statute have been decided. A careful search of those cases discloses that none dealt with true "fighting words," but all dealt with defamatory words. For example, in the following cases, we have specifically stated that an action for insulting words is assimilated to a common-law action for slander or libel: *id.* (plaintiff accused of taking money from employer); *Rosenberg v. Mason*, 157 Va. 215, 160 S.E. 190 (1931) (plaintiff accused of taking money from employer); *Guide Publishing Co. v. Futrell*, 175 Va. 77, 7 S.E.2d 133 (1940) (statement that an unmarried woman was married and a mother); *M. Rosenberg & Sons v. Craft*, 182 Va. 512, 29 S.E.2d 375 (1944) (statement that plaintiff owed money, past due); *Darnel v. Davis*, 190 Va. 701, 58 S.E.2d 68 (1950) (plaintiff accused of trespass); *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 82 S.E.2d 588 (1954) (plaintiff, an attorney, accused of unprofessional conduct); *Weaver v. Finance Company*, 200 Va. 572, 106 S.E.2d 620 (1959) (statement that the plaintiff was in default on a loan); *Letter Carriers v. Austin, Et Al.*, 213 Va. 377, 192 S.E.2d 737 (1972) (plaintiff called a "scab," accompanied by a highly uncomplimentary definition of that term, a classic in the

It may fairly be argued that some of these cases involved words which, in addition to their tendency to defame, might also provoke a breach of the peace, depending on the surrounding circumstances. But it is beyond question that each of them involved words which had, or allegedly had, the effect of damaging the plaintiff's reputation, character, standing in the community, or ability to earn a living. For that reason, they would have been proper subjects for actions of libel or slander. Our statements that actions under the statute were assimilated to actions for defamation were, therefore, perfectly appropriate to the facts of the cases then before us. But to quote those statements in a case involving true "fighting words" is to quote them out of context. The reason is that true "fighting words" have no tendency to defame, but have only a tendency to anger.

As both the plurality opinion and the concurring opinion say, no one would ever believe the foul epithets used by the defendants in this case to be literally true. Regardless of the defendants' intention, they convey no assertion of fact which a hearer would consider capable of proof or disproof. Thus, these words could not form a basis for an action for libel or slander. They are simply verbal assaults. Hence, to hold that a statutory action for such words is "assimilated" to an action for libel or slander is to ignore the historic distinction between the

---

labor movement, written by Jack London); *Shupe v. Rose's Stores*, 213 Va. 374, 192 S.E.2d 766 (1972) (statement that plaintiff's checks would not be honored because her husband had disavowed her debts); and *Tweedy v. J.C. Penny Co.*, 216 Va. 596, 221 S.E.2d 152 (1976) (plaintiff accused of attempted theft).

two purposes served by the statute[3] and to deprive the victim injured by such verbal assaults of any remedy at all.

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[3] The insulting words statute was first enacted in 1810 as a part of a comprehensive scheme to deter duelling. In 1849 it was amended to permit the defendant to interpose such defenses as privilege and truth. We observed in *Chaffin v. Lynch*, 83 Va. 106, 121, 1 S.E. 803, 812 (1887), that the legislature had evidently concluded that the statute was a failure as a deterrent to duels. When the same case came before us again in 1888, 84 Va. 884, 888, 6 S.E. 474, 476, we specifically held that the statute "applies to both classes of actions alike," *i.e.* (1) actions for insults tending to a breach of the peace, and (2) actions for libel and slander. The reason for leaving it on the books, despite its failure as an anti-duelling measure, was that the first class of cases had not been actionable at common law, and the second class was made actionable by the statute without the common-law requirement of publication. It is clear that in our cases prior to 1928, the distinction between the two classes was clearly recognized. In *Hines v. Gravins*, 136 Va. 313, 320, 112 S.E.2d 869, 871 (1923) (citations omitted), we said:

> When the history of the statute is recalled, and it is observed that its purpose was so to extend the common law as to give a right of action for insulting words, even though containing no imputation which was actionable at common law, the reason for the rule . . . seems to us apparent. The design of the statute is to prevent breaches of the peace . . . .

In *Wright v. Cofield*, 146 Va. 637, 640, 131 S.E. 787, 788 (1926), our last true "fighting words" case, we said that the purpose of the statute was "[t]o prevent the use of language by one toward another likely to bring about a personal encounter."

The only other States having similar statutes appear to be West Virginia and Mississippi. In both, the distinction between "fighting words" and defamatory words is clearly recognized, and the respective statutes are made applicable to "fighting words" for the purpose of discouraging breaches of the peace, *Mauck v. City of Martinsburg*, 280 S.E.2d 216 (W. Va. 1981); Malone, *Insult in Retaliation - The Huckabee Case*, 11 Miss. L.J. 333 (1939). Neither state holds that the statutory action, in cases involving "fighting words," has been assimilated to an action for defamation.

If there is an unfortunate lack of remedy for such words in Virginia, as the plurality opinion implies and the concurring opinion flatly states, the fault cannot be laid at the door of the General Assembly. That body has amended the statute several times since 1928. It expressly reenacted it as a part of the Code of 1950 (former § 8-630) and again reenacted it in the 1977 recodification which resulted in the adoption of Title 8.01. Each time, the legislature specified that the words made actionable are those which "tend to violence and breach of the peace." If the statute is as hamstrung as the concurring opinion says, it is the interpretation expressed in that opinion which makes it so.

Although the remedy which the statute provides for defamatory words has been assimilated to an action for libel or slander, its remedy for true "fighting words" remains. The General Assembly has said so repeatedly, and we have never said otherwise. The effect of our insulting words statute, therefore, has been narrowed in precisely the same way as New Hampshire's was in *Chaplinsky*.

I would hold that Code § 8.01-45 affords an independent cause of action to redress true "fighting words" which tend to provoke violence and breach of the peace, as distinguished from words merely defamatory, and that such actions are not assimilated to actions for libel or slander. I would further hold, because of the State's legitimate interest in preserving internal peace and public order, that the remedy is not preempted by federal law. Because the plaintiff proved a case which clearly meets the foregoing requirements, I would affirm.

Carrico, C.J., and Stephenson, J., join in dissent.

Cochran, J., concurring:

I reach the same result as the majority solely by application of Virginia law. We have long held that an action for insulting words under Code § 8.01-45 and its predecessors is treated in all respects as a common-law action for slander or libel, with the exception that no publication is required in an action for insulting words.

> The trial of an action for insulting words is completely assimilated to the common law action for libel or slander, and from the standpoint of the Virginia law it is an action for libel or slander.

Carwile v. *Richmond Newspapers*, 196 Va. 1, 6, 82 S.E.2d 588, 591 (1954); *see also Shupe* v. *Rose's Stores*, 213 Va. 374, 375, 192 S.E.2d 766, 767 (1972); *M. Rosenberg & Sons* v. *Craft*, 182 Va. 512, 528, 29 S.E.2d 375, 382-83 (1944); *W. T. Grant Co.* v. *Owens*, 149 Va. 906, 913-14, 141 S.E. 860, 863 (1928). The statute itself is now a useless appendage to the common law, an obsolete vestige of the proclivity for duelling which initially prompted the legislature to enact the law rewarding the victim for enduring an insult and penalizing the offender for the criminal act of provoking a breach of the peace. *See* Note, *The Actionable Words Statute in Virginia*, 27 Va. L. Rev. 405, 414 (1941).

Only false utterances are actionable under the common law of defamation. *See Rosenberg*, 182 Va. at 518, 29 S.E.2d at 378 (five classes of defamatory language). Accordingly, an action under the insulting words statute can be maintained only on the basis of a false statement. An epithet, however repulsive or intemperate, used to convey the speaker's contempt for another, is not defamatory when it cannot reasonably be understood to con-

vey its literal meaning. When uttered in this context, such an expression is not a representation of fact, the truth or falsity of which is capable of proof.

Although use of the two offensive words upon which the judgments in the present cases were based may have tended to violence and breach of the peace, as the trial court held, they are not actionable under the insulting words statute because, in the context in which they were spoken, they are incapable of defamatory meaning. Therefore, the question whether such an action would be preempted by the federal labor laws is moot.

APPENDIX B

Order of the
Circuit Court of Giles County

February 25, 1982

V I R G I N I A:

IN THE CIRCUIT COURT OF GILES COUNTY

CHARLES EAVES, *et al.*,	X	
Plaintiffs,	X	
vs.	X	At Law No. 5581
UNITED STEELWORKERS OF AMERICA, AFL-CIO, *et al.*,	X	
Defendants.	X	

FINAL ORDER

THIS CAUSE came on to be heard on May 26, 1981, and continued thereafter until all evidence was heard, and this Court considered all evidence, including testimony and exhibits, all motions, memoranda and other pleadings submitted by all parties, and arguments of all counsel;

UPON CONSIDERATION WHEREOF, and pursuant to a letter of opinion of this Court dated September 21, 1981, it is hereby

ADJUDGED, ORDERED AND DECREED:

1. That the Motion to Strike of Defendants Russell B. White, Jr., L. A. Higgenbotham, C. E. Fields, W. T. Link, K. W. McManama, D. W. Myers, and L. R. Simpkins is sustained.

2. That this Court finds facts and conclusions of law as follows:

a. The United Steelworkers of America, AFL-CIO, Local Union 14948, acted as an agent for United Steelworkers of America, AFL-CIO, in that although United Steelworkers of America, AFL-CIO, recommended against the strike, it admitted in Paragraph 6 of its Answer to the Amended Motion for Judgment that it authorized the membership of the Local to strike; and in addition, the United Steelworkers of America, AFL-CIO, provided certain funds for distribution to certain strikers and picketers.

b. Pursuant to § 8.01-45 of the Code of Virginia (1950), as amended, this Court finds that the use of the words "scab," "scabby," "nigger," "bastard," and "son-of-a-bitch," are not actionable, but the words "cocksucker" and "motherfucker" are actionable as those two words tend to violence and breach of the peace;

3. That this Court finds no liability on the part of any Defendant for violations of §§ 40.1-66, and 40.1-67, and 40.1-53 of the Code of Virginia (1950), as amended;

4. That this Court finds no liability on the part of any Defendant for intentional infliction of emotional distress under the "Fourth Cause of Action" in Plaintiffs' Motion for Judgment;

5. That this Court finds no liability on the part of any Defendant under the "First Cause of Action" in Plaintiffs' Motion for Judgment;

6. That this Court awards damages based on violation of § 8.01-45 of the Code of Virginia (1950), as amended, for each Plaintiff and against Defendants, jointly and severally, in the amount of $1,000.00 compensatory

damages and $10,000.00 punitive damages, plus interest from date of this Order, as follows:

a. Charles Eaves: M. E. Collins, United Steelworkers of America, AFL-CIO, and United Steelworkers of America, AFL-CIO, Local 14948.

b. Larry Crawford: W. E. Sessor, United Steelworkers of America, AFL-CIO, and United Steelworkers of America, AFL-CIO, Local 14948.

c. Thomas E. Dudley: W. E. Sessor, United Steelworkers of America, AFL-CIO, and United Steelworkers of America, AFL-CIO, Local 14948.

d. James E. Noonkester: W. E. Sessor, United Steelworkers of America, AFL-CIO, and United Steelworkers of America, AFL-CIO, Local 14948.

e. Raleigh Newby: J. M. Radford, W. E. Sessor, Linwood Stewart, Kermit Stevors, United Steelworkers of America, AFL-CIO, and United Steelworkers of America, AFL-CIO, Local 14948.

f. G. W. Keffer: Kermit Stevors, United Steelworkers of America, AFL-CIO, and United Steelworkers of America, AFL-CIO, Local 14948.

AND THIS CAUSE IS FINAL.

Entered this 25th day of Feb, 1982.

/s/ K. Devore

JUDGE

SEEN AND EXCEPTED TO:

/s/ James Newton Wilhoit, III

James Newton Wilhoit, III
James L. Hutton
Counsel for Plaintiffs

SEEN AND EXCEPTED TO:

/s/ Robert H. Stropp, Jr.

Robert H. Stropp, Jr.
C. Barry Anderson
Counsel for Defendants

SEEN AND EXCEPTED TO:

/s/ J. Livingstone Dillow

J. Livingstone Dillow
Counsel for Defendant,
Kermit Stevors

Copy Teste:
March 17
Ted J. Johnson, Jr. Clerk

/s/ Scarlet B. Ratcliffe

Scarlet B. Ratcliffe, Dep. Clerk

APPENDIX C

Letter of
Judge Kenneth Devore

September 9, 1982

TWENTY-SEVENTH JUDICIAL CIRCUIT

JUDGES:

R. WILLIAM ARTHUR
Wytheville, Virginia

KENNETH I. DEVORE
Christiansburg, Virginia

DALE W. LaRUE
Hillsville, Virginia

(SEAL)

P.O. BOX 389
CHRISTIANSBURG, VIRGINIA 24073

COUNTIES:

Carroll
Floyd
Grayson
Montgomery
Pulaski
Wythe

CITIES:

Galax
Radford

September 9, 1982

Mr. James Newton Wilhoit, III
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P. O. Box 892
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Mr. J. Livingstone Dillow
Dillow & Stafford
Attorneys at Law
Giles Professional Building
Pearisburg, Virginia 24134

Re: Charles Eaves, et als
v.
United Steel Workers, AFL-CIO, et als

Gentlemen:

I am sorry about the confusion and error in the final order entered by the Court on February 25, 1982, which was seen and excepted to by all counsel.

KENNETH I. DEVORE

Messrs. Wilhoit, Stropp,
Anderson & Dillow
Page 2
September 9, 1982

I thought my letter opinion of September 21, 1981, and my statement at the conclusion of the final hearing on November 18, 1981, Pages 27 and 28 of the Transcript of Trial Proceedings, in this matter was clear. In my letter opinion, I sustained the motions to strike the following defendants:

> Russell B. White, Jr., L. A. Higgenbotham, C. E. Fields, W. T. Link, K. W. McManama, D. W. Myers and L. R. Simpkins.

The letter opinion further stated that the *plaintiffs* were entitled to compensatory damages as well as punitive damages against the United Steel Workers of America, AFL-CIO, and the United Steel Workers, AFL-CIO, Local 14948, with certain plaintiffs being entitled to damages with certain of the other defendants. This fully sets forth that the plaintiffs were entitled to compensatory damages as well as punitive damages.

If the final order omitted certain of the plaintiffs, then I will correct this by a supplement order granting judgment to those plaintiffs, and if you gentlemen will circulate a sketch of an order to this effect, of course, again saving your exceptions, I would appreciate it.

Very truly yours,

/s/ Kenneth I. Devore

Kenneth I. Devore

KID:ihc
cc: Mr. Ted J. Johnson, Jr., Clerk
Mr. James L. Hutton

APPENDIX D

Letter Opinion of Judge Kenneth Devore

September 21, 1981

TWENTY-SEVENTH JUDICIAL CIRCUIT

JUDGES:

R. WILLIAM ARTHUR
Wytheville, Virginia

KENNETH I. DEVORE
Christiansburg, Virginia

DALE W. LaRUE
Hillsville, Virginia

(SEAL)

P.O. BOX 389
CHRISTIANSBURG, VIRGINIA 24073

COUNTIES:

Carroll
Floyd
Grayson
Montgomery
Pulaski
Wythe

CITIES:

Galax
Radford

September 21, 1982

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Pearisburg, Virginia 24134

Re: Charles Eaves, et als
v.
United Steel Workers, AFL-CIO, et als

Gentlemen:

I have gone over the file in this matter and read the Transcript of the Evidence on several occasions and have also studied your Post Trial Briefs, for which I thank you.

This is basically an action under Section 8.01-45 of the 1950 Code of Virginia, which provides:

All words which from their usual construction and common acceptation are construed as insults tending to violence and breach of the peace shall be actionable.

Without going into the particular words that were used, as shown in the Transcript of the Evidence in this case, I am of the opinion that I know of no other words which from their usual construction and common acceptation would be considered insults tending to violence and breach of the peace. "Fighting words". The facts in the case are distinguishable from the *Austin, et al* v. *Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO*, 418 U.S. 264 (1974). In the Austin case, the word "scab" was used and later defined in writing. The words used in this case were in addition to scab, more vile and degrading. They are also distinguishable from the language as used in the *Linn* v. *United Plant Guard Workers of America, Local 114, et al*, 383 U.S. 53 (1966).

Pursuant to Section 40.1-53 of the 1950 Code of Virginia, Virginia has a right to work law, which was for the benefit of the plaintiffs.

In reference to the United Steel Workers, AFL-CIO, defendant, that there was an agency relationship, although, the staff representative of the International testified that he recommended against strike, however, in the Answer to the Amended Motion for Judgment, Paragraph Six (6) thereof, it was admitted that the United Steel Workers of America authorized the strike and provided funds for the strikers and picketers during the strike. I, therefore, find that the United Steel Workers of America and the United Steel Workers, AFL-CIO, Local 14948, are liable to the hereinafter set forth plaintiffs, along with certain other defendants.

I would, based on the evidence in this case, sustain the motions to strike the following defendants:

Russell B. White, Jr., L. A. Higgenbotham, C. E. Fields, W. T. Link, K. W. McManama, D. W. Myers and L. R. Simpkins.

I further find that the plaintiffs are entitled to compensatory damages, as well as punitive damages, against the United Steel Workers of America, AFL-CIO, the United Steel Workers, AFL-CIO, Local 14948, and in addition, the plaintiff, Raleigh Newby, is entitled to damages from the defendants, J. M. Radford, W. E. Sessor and Linwood Stewart. The plaintiff, Charles Eaves, is entitled to damages against M. E. Collins also, and the plaintiffs, Larry Crawford, Thomas E. Dudley and James E. Noonkester, against the defendant, W. E. Sessor.

Before ascertaining damages, Mr. Dillow advised when we last met that if I did not sustain a motion to strike as to his defendant, Kermit Stevers, then he would like to have an opportunity for him to testify. I find from a reading of the Transcript that I could not sustain a motion as to Mr. Stevers and would, therefore, give Mr. Dillow an opportunity, at a convenient date, to have him testify.

Very truly yours,

/s/ K. Devore

Kenneth I. Devore

KID:lhc
cc: Mr. Ted J. Johnson, Jr., Clerk

APPENDIX E

Supplemental Order of the Circuit Court of Giles County

October 12, 1982

VIRGINIA: CIRCUIT COURT OF GILES COUNTY
FRIDAY, the 12th day of October, 1982
THE 206TH YEAR OF THE COMMONWEALTH

PRESENT: HON. KENNETH DEVORE — JUDGE

CHARLES EAVES, et al

v. : SUPPLEMENTAL ORDER
Law Action No. 5581

UNITED STEELWORKERS
OF AMERICA, AFL-CIO, et al

WHEREAS, by letter opinion of the Court dated September 21, 1981, the Court rendered its written rulings in this cause; and

WHEREAS, by order entered by the Court February 25, 1982, no provision was made for plaintiffs Michael D. Kellison, Richard Lee Spicer and Lewis H. Vaughan to have any damages awarded to any of them; and

WHEREAS, the Court by letter to counsel dated September 9, 1982, indicated its intention that if the final order rendered February 25, 1982, omitted certain of the plaintiffs that the Court would correct this by a supplement order granting judgment to those plaintiffs; and

WHEREAS, counsel for the defendants, by letter of Robert H. Stropp, Jr., dated August 20, 1982, and directed to the Court has set forth the exceptions of the defendants to the entry of any supplemental order, notwithstanding which the Court by its letter of September 9,

1982, indicated its intention to enter such an order;

NOW, THEREFORE, the Court hereby enters this order to supplement the final order entered herein February 25, 1982, as follows:

The Court hereby awards damages based on violation of Section 8.01-45 of the Code of Virginia (1950), as amended, for each plaintiff and against defendants, jointly and severally, in the amount of $1,000.00 compensatory damages and $10,000.00 punitive damages, plus interest from February 25, 1982, as follows:

g. Michael D. Kellison: United Steelworkers of America, AFL-CIO, and United Steelworkers of America, AFL-CIO, Local 14948.

h. Richard Lee Spicer: United Steelworkers of America, AFL-CIO, and United Steelworkers of America, AFL-CIO, Local 14948.

i. Lewis H. Vaughan: United Steelworkers of America, AFL-CIO, and United Steelworkers of America, AFL-CIO, Local 14948.

AND THIS CAUSE IS FINAL.

Enter this Supplemental Order this 12th day of Oct., 1982.

/s/ K. Devore

JUDGE

SEEN AND EXCEPTED TO:

/s/ James Newton Wilhoit, III

James Newton Wilhoit, III
James L. Hutton
Counsel for Plaintiffs

SEEN AND EXCEPTED TO:

/s/ Robert H. Stropp, Jr.

Robert H. Stropp, Jr.
C. Barry Anderson
Counsel for Defendants

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No. 85-1158

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LARRY CRAWFORD, *et al.*,
Petitioners,
v.
UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF RESPONDENTS UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC, *et al.*, IN OPPOSITION

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This case does not merit plenary consideration by this Court.

1. Petitioners challenge the decision of the Supreme Court of Virginia reversing a trial court judgment which had held several striking employees and their union liable to certain of their fellow employees who had continued to work during the strike, solely because the former had called the latter by the epithets "cocksucker" and "motherfucker." A plurality of the Supreme Court of Virginia held that this "relief . . . based on pure speech, not con-

duct, but speech—standing alone" (App. 15)[1] was precluded by this Court's decisions in *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966), and *Letter Carriers v. Austin*, 418 U.S. 264 (1974). Justice Cochran, whose vote was essential to the disposition of the case, "reach[ed] the same result . . . solely by application of Virginia law" (App. 37a).

The plurality opinion represents a straightforward application of settled law. *Linn* and *Austin* hold, on the basis of federal labor policy, that a State may not punish a party to a labor dispute for his "intemperate, abusive, or insulting language" (*Austin* at 283), or even for "the most repulsive speech" (*Linn* at 63), unless it is shown that the defendant made "defamatory statements . . . with knowledge of their falsity or with reckless disregard of whether they were true or false. . . ." (*Linn* at 65). Accord, *Farmer v. Carpenters*, 430 U.S. 290, 299 (1977). Under that test, which petitioners concede should be applied here (Pet. 10), "[t]he *sine qua non* of recovery . . . is the existence of falsehood. . . . Before the test of reckless or knowing falsity can be met, there must be a false statement of fact" (*Austin* at 283-284).

In applying that test, the plurality merely held that the use of the epithets "cocksucker" and "motherfucker" "cannot reasonably be understood, under the circumstances of this labor dispute, to convey a false representation of fact" (App. 23a-24a). See also App. 37a (Cochran, J., concurring) (applying the same analysis as a matter of Virginia law). The Virginia Court found those epithets to constitute rhetorical hyperbole and not to have been intended or understood as representations of fact. The Virginia Court's fact-bound determination as to the nature of these statements, which would not in any event

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[1] References to "App." are to the Appendix to the Petition for a Writ of Certiorari. References to "Pet." are to the Petition.

warrant review by this Court, was plainly correct and consistent with established decisional law.[2]

2. Petitioners assert that they were the victims of "acts of outrageous conduct and threats of physical and emotional abuse" (Pet. 3-4). But petitioners' claims based on this alleged conduct were rejected by both State courts solely as a matter of Virginia law.

The very trial court judgment which petitioners seek to reinstate (Pet. 13) rejected those claims. The Supreme Court of Virginia accurately described the relevant portion of the trial court's decision:

> After considering extensive and conflicting testimonial evidence, the trial court rejected virtually all of plaintiffs' contentions . . . [and] ruled . . . that there was no violation of Code §§ 40.1-53, 40.1-66, or 40.1-67, which concern picketing and right to work; that there was no intentional infliction of emotional distress; [and] that there was no assault and battery . . . [App. 3a].

Those determinations were affirmed by the Supreme Court of Virginia, solely on state-law grounds (App. 24a-27a).[3]

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[2] See *Austin*, *supra*, at 284-286 (statement referring to a strikebreaker as a "traitor" was "merely rhetorical hyperbole," not a false statement of fact); *Greenbelt Publishing Assn. v. Bresler*, 398 U.S. 6, 14 (1970) (accusation that a real estate developer was engaging in "blackmail" was "no more than rhetorical hyperbole," not a false statement of fact); *Curtis Publishing Co. v. Birdsong*, 360 F.2d 344, 348 (5th Cir. 1966) (article referring to members of state police as 'bastards" was not a false statement of fact; "it is perfectly apparent that these words were used as mere epithets, as terms of abuse and opprobrium").

[3] Petitioners therefore err in suggesting that this case presents any question as to the application of *Farmer v. Carpenters*, *supra*. In *Farmer* this Court held that in certain circumstances a State may punish conduct, occurring in connection with a labor dispute, which is "so outrageous that 'no reasonable man in a civilized society should be expected to endure it.'" *Id.* at 302, quoted at Pet. 11. Virginia law recognizes such a cause of action (*Womack v. Eldridge*,

Thus, this is not a case in which claims based on "acts of outrageous conduct and threats of physical and emotional abuse" (Pet. 3-4) were held to be preempted by federal law. Rather, petitioners' claims in this regard were rejected by both the trial court and the Supreme Court of Virginia solely on state-law grounds, and petitioners could not challenge that disposition in this Court.[4]

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215 Va. 338, 210 S.E.2d 145 (1974)), and petitioners asserted that cause of action in the trial court. But the trial judge found against petitioners on "factual" grounds (App. 27a), determining "that there was no intentional infliction of emotional distress" in this case (App. 3a). The Supreme Court of Virginia affirmed the trial court's determination that "the plaintiffs did not prove their case on this issue" under the standards of Virginia law as defined in *Womack v. Eldridge*, *supra* (App. 27a). Thus, no federal question is presented by the Virginia Court's rejection of petitioners' claims of "outrageous conduct."

So too, while petitioners continue to assert that respondents' conduct violated § 40.1-53 of the Code of Virginia (Pet. 6, 8), the Virginia Court rejected that claim on the ground that the Code provision invoked by petitioners does not authorize a private action for damages (App. 24a-25a).

[4] Nor, in any event, is such a challenge fairly encompassed by petitioners' Question Presented. The petition questions only "[w]hether the decision . . . reversing the award by the trial court . . . of . . . damages for use of insulting words [was erroneous]." Pet. i. See also *id.* at 13 (concluding that "the . . . damage award of the trial court for use of insulting words under the applicable Virginia statute should be . . . reinstated by this Court"). The petition does not question the rulings of the Supreme Court of Virginia on the claims that had been *rejected* by the trial court.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Virginia

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The Question Presented Was Incorrectly Decided By The Supreme Court Of Virginia In Light Of The Decisions Of This Court And Warrants Review By This Court.

This case arises as the result of outrageous, vile and insulting language used in the context of a labor dispute on a continuous basis over a period of seventeen months.

This Court limited the far reaching effect of its decision in *Austin v. Old Dominion Branch No. 496, National Association of Letter Carriers*, 418 U.S. 264, 94 S. Ct. 2770, 41 L.Ed.2d 745 (1974), in *Farmer v. United*

Brotherhood of Carpenters, Local 25, 430 U.S. 290, 97 S. Ct. 1056, 51 L.Ed.2d 338 (1977) when it found that the state had the authority to protect its citizens from conduct "so outrageous that 'no reasonable man in a civilized society should be expected to endure it.'" 430 U.S. at 302, 97 S. Ct. at 1064, 51 L.Ed.2d at 351. The *Farmer* case is directly on point with this case in which Petitioners seek review by this Court but the majority opinion of the Supreme Court of Virginia failed to apply this Court's decision in that case. Here Petitioners were subjected to seventeen months of continuous "frequent public ridicule" and "incessant verbal abuse," conduct found actionable in *Farmer*, *supra*.

The Virginia insulting words statute, § 8.01-45 of the Code of Virginia (1950), as amended, provides a remedy for the use of fighting words, *i.e.* words that would tend toward violence and breach of the peace. In *Farmer*, *supra*, Justice Powell wrote for this Court:

> Nothing in the federal labor statutes protects or immunizes from state action violence or the threat of violence in a labor dispute . . . and thus there is no risk that state damages actions will fetter the exercise of rights protected by the NLRA. On the other hand, our cases consistently have recognized the historic state interest in "such traditionally local matters as public safety and order. . . ." And, as with the defamation actions preserved by *Linn*, state-court actions to redress injuries caused by violence or threats of violence are consistent with effective administration of the federal scheme: Such actions can be adjudicated without regard to the merits of the underlying labor controversy. 430 U.S. at 299-300, 97 S. Ct. at 1063 (citations omitted).

The decision in *Farmer*, *supra*, corrected the apparent and indefensible inadequacies of the majority decision in *Austin*, *supra*, so clearly pointed out by the dissent in that case when Justice Powell said:

> Yet the majority nevertheless holds that the state libel judgments entered below are pre-empted by federal labor law. This conclusion seems to me a needless denigration of the "overriding state interest" in compensating individuals for injury to reputation. Moreover, it leaves these appellees without effective remedy for the wrong done them. Far from representing a powerful economic interest that could fight for itself within the federally created system of individual self-government, these appellees were defenseless individuals. In their "dispute" with the union, appellees found themselves in that state of helpless inequality that first gave social meaning to the labor movement. 418 U.S. at 295-6, 94 S. Ct. at 2787 (footnote omitted).

Thus, it is obvious that the Supreme Court of Virginia failed to understand the decisions of this Court, in reversing the trial court's award of damages in this case. This case should be reversed and returned to the Supreme Court of Virginia in order that it might review all of the questions presented on appeal.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

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